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No. 181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

EVELINE MCCULLAGH, *Petitioner*,

AGAINST

HOUSTON CHRONICLE PUBLISHING COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit

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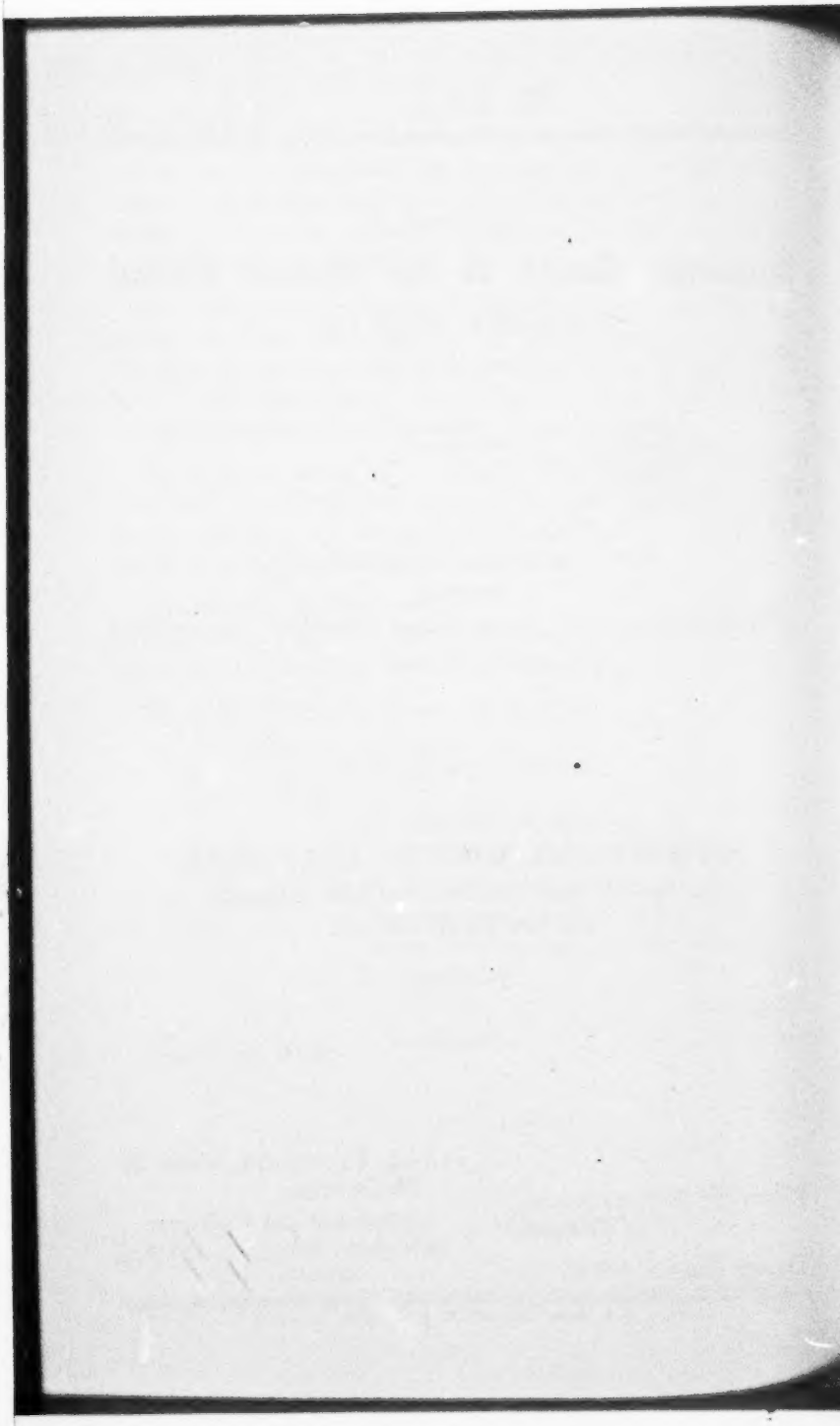

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AGAINST

HOUSTON CHRONICLE PUBLISHING COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Eveline McCullagh, a feme sole, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the judgment of affirmance of the judgment of the trial court entered on March 12, 1954, and the order of said Court overruling the motion for rehearing entered on April 9, 1954, in Cause No. 14,627, on the docket of that Court.

Official and Unofficial Reports of Courts Below

The opinion of the Court of Appeals is reported as MCCULLAGH V. HOUSTON CHRONICLE PUBLISHING COMPANY, 211 F. 2d 4, in Advance Sheet of May 3, 1954.

The opinion of the District Court for the Southern Dis-

trict of Texas, Houston Division, by Honorable Ben Connally, District Judge, is unreported. It is a memorandum opinion, dated April 22, 1953, and found at pages 43-49 of the transcript of record, and is found in the appendix to this petition.

Jurisdictional Statement

Jurisdiction to issue the writ requested is provided for in Title 28, U. S. CODE, Section 1254(1).

Jurisdiction under the law and facts in this particular case is invoked under Rule 19(b) of the Revised Rules of this Court. Petitioner urges that the Court of Appeals has rendered a decision on important questions of Federal law which have not been, but should be, settled by this Court, and has decided a Federal question in a way in conflict with applicable decisions of this Court, and has decided important state questions in a way in conflict with applicable state law.

The judgment of the Court of Appeals was dated and entered on March 12, 1954. (R. 74) and (R. 78).

Petition for rehearing was filed in the Court of Appeals on April 1, 1954, within the time prescribed by the Rules. The motion for rehearing was overruled by the Court of Appeals on April 9, 1954.

Questions Presented for Review

The principal questions presented for review relate to the proper construction to be given the Ninth Amendment to the CONSTITUTION OF THE UNITED STATES, which we quote as follows:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

1. Are the right of an individual to be free from public ridicule and caricature, and the right of privacy, inherent and fundamental rights of natural endowment and personal security, and a part of the unenumerated rights which are protected by the Ninth Amendment to the Constitution of the United States?

2. Is there such a thing as the right of privacy and the right to be free from public ridicule and caricature in a daily newspaper; and if such rights exist, can such rights be denied or disparaged by either the statutory law or the law of decision of the State of Texas? Does such a denial or disparagement violate the Ninth Amendment to the Constitution of the United States and does it amount to a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States?

3. Is the Ninth Amendment to the Constitution of the United States to be construed as a great declaration of the natural and inherent liberty of the individual, which protects natural rights whether enumerated or unenumerated in the Constitution, or is it to be narrowly construed as an inhibition against the Federal Government only so that these natural rights may be denied and disparaged by State Governments?

4. What are the unenumerated rights which the Ninth Amendment states shall not be denied or disparaged? Is the Constitution the source of individual liberty or does it merely reaffirm the fundamental rights of mankind; are men endowed by their Creator with natural rights, or shall we look to the rights enumerated in the Constitution and to the due process of law clause in the Fourteenth Amendment as the only source of our fundamental and inherent rights?

5. Did the Court of Appeals err in holding that plain-

tiff's petition did not allege injury to petitioner's reputation, when a plain reading of paragraphs 6, 7, and 8 of plaintiff's petition definitely did allege injury to her professional reputation as a teacher of dancing; and in holding in effect that an injury to her professional reputation would not support a suit for libel without an allegation of defamation of her moral reputation that would impeach her honesty, integrity, or virtue, when there is no support in Texas decisions or statutes for such narrow limitations on the word "defamation"?

6. Do newspapers and other agencies of communication have unrestricted license and privilege to expose private individuals to overwhelming and more than trivial ridicule by cartoon and caricature solely for the purpose of amusement of readers and viewers?

7. Did the Court err in holding that under the decisions of the State of Texas a right of privacy does not exist, and if such is the state of the statutory law and law of decision in Texas that it recognizes no newly discovered rights which have become apparent since January 20, 1840 when the common law of England was adopted by the Republic of Texas, are such statutes and decisions which refuse to recognize and protect the right of privacy and the right to be free from public ridicule and caricature unconstitutional as violating the Ninth and Fourteenth Amendments to the Constitution of the United States?

8. Did the District Court err in refusing to grant plaintiff leave to file her second amended original petition which more fully set out her constitutional rights, and in dismissing plaintiff's suit and refusing to grant her leave to amend if such amended petition would state a cause of action?

9. Did the Court of Appeals err in sustaining the ruling of the District Court which struck from plaintiff's original petition an allegation that the libelous publication quoted Miss McCullagh as being antagonistic to the American people and ridiculed her for being an English or British subject?

Constitutional Provisions and Statutes Involved

This case involves two amendments to the Constitution of the United States of America, as follows:

ARTICLE NINE OF THE AMENDMENTS.

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

It also involves the "due process of law" provision of the Fourteenth Amendment to the Constitution of the United States.

Two Texas statutes are involved. Article 5430 of the REVISED CIVIL STATUTES OF THE STATE OF TEXAS defines libel as follows:

"A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury. Acts, 1901, p. 30." VERNON'S CIVIL STATUTES, No. 16, p. 7,

and Article 1 of the REVISED CIVIL STATUTES OF TEXAS as follows:

"The common law of England, so far as it is not inconsistent with the Constitution and laws of this State,

shall together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature."

Statement of the Case

This case was appealed to the Court of Appeals after the District Court dismissed Petitioner's case for failure to allege a cause of action. Therefore, no facts are involved except the facts alleged in Plaintiff's First Amended Original Complaint, and possibly her Second Amended Original Complaint which she requested leave to file but which leave was refused by the trial court.

The most important legal questions in the case are not discernible from a reading of the opinion by the Court of Appeals or the memorandum opinion by the District Court, because both opinions ignore and do not decide whether her constitutional rights under the Ninth and Fourteenth Amendments have been violated.

Eveline McCullagh, prior to the institution of this suit, had filed suit against the Houston Transit Company in the United States District Court for the Southern District of Texas for damages sustained while a passenger on a bus of the Houston Transit Company. The Court of Appeals erroneously, and without any foundation in the record, stated that she received "a minor injury". However, Petitioner received $5,000.00 in settlement of her claim and this fact is recited in order that this Honorable Court may not believe that Petitioner's suit against the Houston Transit Company was a predatory or nuisance suit. On the other hand, her injuries were substantial.

The day after she filed her suit, the Respondent, Houston Chronicle Publishing Company, a daily newspaper in Houston, Texas, with wide circulation, carried on the front page

of its Sunday edition a purportedly humorous newsstory and a cartoon caricaturing Miss McCullagh, which appears on page 72 of the transcript. The obvious purpose of the caricature, cartoon, and newsstory was to ridicule Miss McCullagh and poke fun at her physical appearance, and lampoon her attempt to obtain justice as an English citizen in an American court at law, solely for the purpose of delighting and entertaining the readers of the newspaper at Miss McCullagh's expense. The Petitioner filed this suit in the United States District Court for the Southern District of Texas, asking damages for libel and the invasion of her right of privacy, her right to be let alone, and her right as a private citizen to be free from humiliating ridicule in the public press.

The trial court dismissed plaintiff's Second Amended Original Petition because it did not state facts sufficient to constitute a cause of action. Petitioner, before the entry of the order of dismissal, asked for leave to file her Second Amended Original Complaint which more fully alleged her constitutional rights, but the trial court refused leave to file this pleading. The Second Amended Original Petition may probably have been unnecessary since it only alleged constitutional reasons why the facts recited in the prior pleading constituted a cause of action, and it is only necessary to recite facts. Hence, the Second Amended Original Petition may have been unnecessary, and the constitutional questions were raised and can be raised under the first amended petition which was considered by the Court, if such constitutional considerations are valid reasons why plaintiff's pleading stated a cause of action.

Both lower courts held that the plaintiff may have been ridiculed, and the trial court held that this may have injured her feelings and sensibilities, and that the story was a

cheap type of journalism and in poor taste, but since it only ridiculed the Petitioner and injured her feelings, it was not libelous.

Both courts committed grave error in failing to carefully examine Petitioner's First Amended Petition which was the trial pleading, and particularly paragraphs 6, 7, and 8 thereof which expressly alleged damage to her professional reputation as a dancing teacher. Both courts erroneously held that there was no allegation of injury to her reputation. Both courts held that since her *moral* reputation and her honesty, integrity, and virtue were not impugned, she could have no cause of action for injury to her professional reputation. This was obviously erroneous.

Both lower courts held that there was no such thing as a cause of action for violation of the right of privacy in Texas, and no right to be free from public ridicule by cartoon or caricature for the amusement of the general public.

Both courts completely ignored and refused to pass upon whether the right of privacy and the right to be free from public ridicule are natural inherent rights which should have been protected by the Courts under the Ninth and Fourteents Amendments to the Constitution.

The District Court of the United States for the Southern District of Texas had jurisdiction of this cause by virtue of diversity of citizenship of the Petitioner and the Respondent. The Petitioner is a citizen of Great Britain and the Respondent is a corporation domiciled and existing under the laws of the State of Texas.

Foreword

Questions in this case relating to the Ninth Amendment and its protection of inherent and fundamental rights of

natural endowment have apparently never been raised in this Court before. In fact, this amendment has little or practically no construction. No. "unenumerated" right has ever been defined or vindicated by any court. We feel that the questions involved are of tremendous importance and of first impression. Therefore, we beg the indulgence of the Court if this application should contain a few more pages than the usual application, in order that the history and background of this amendment may be revealed. We must of need argue by reasoning because there is little or no precedent.

We ask leave to file nine copies of our brief and supplemental brief in the Court of Appeals which more fully cover these questions in the event the Court feels the questions worthy of serious consideration.

Argument and Authorities

Point 1

Petitioner's right of privacy, her right to be let alone, and right to be free from public ridicule and caricature are fundamental inherent and basic rights of natural endowment, and a denial of these rights constitutes a violation of the Ninth Amendment and due process of law under the Fourteenth Amendment to the Constitution of the United States.

(Pertinent to Questions 1, 2, 3 and 4)

We shall first present the constitutional questions. We shall later present the error of the lower courts in holding that the petition did not state an action for libel and in holding that a right of privacy could not exist in Texas.

We first ask this Court to read the newsstory and observe the caricature. (R. 72). It was obviously intended for no other purpose than to ridicule Miss McCullagh for the entertainment and amusement of its readers. It distorted her physical appearance and made her appear as a large and overweight, grotesque and repulsive person, which is damaging to any professional person, and particularly an instructor in ballroom dancing. It depicted a woman with a face fit only for the comic strips, with short cut, mannish looking hair, bristling out and standing on end like an aborigine. She was shown in an ungainly position dancing with an animated bus. No part of the caricature in any way resembled this genteel, refined and personable English woman. Her picture did not appear, but instead a comic, vulgar and insulting caricature. The publication was not a privileged communication and was not a fair comment or report upon pending litigation. Of course, she was deeply embarrassed and humiliated and suffered mental and physical pain and anguish, and she so alleged. She alleged injury to her reputation and to her professional prestige as a dancing teacher. It cannot possibly be denied that the publication was intentional and malicious. It could not appear on the front page of a Sunday metropolitan newspaper otherwise.

The lower courts denied relief because she alleged injury to her professional reputation but no defamation or damage to her moral reputation for honesty, integrity, or virtue, and because the right of privacy was unknown to the common law of England in 1840 when the common law of England was adopted by legislative act by the Republic of Texas, and that therefore such a newly discovered right could not be protected by laws of the State of Texas under Article 1 of its REVISED STATUTES.

Is it right, then, that the newspapers of Texas and any

other persons, by handbill or other publication, can publicly ridicule, abuse, and caricature a private person for no other purpose than to make fun of him, just so long as his moral reputation for honesty, integrity, and virtue are not impugned. If the State of Texas through its common law or statutes tolerates such an invasion of human liberty and rights, and has such slight regard for human dignity, human anguish, and professional injury, then it is well worth the consideration of this Court to determine whether such rights are such fundamental and inherent rights of natural endowment as to warrant their protection under the Constitution of the United States. As we have said before, we disagree with the interpretation of the Statutes by the lower courts; but if said courts are correct, we invoke the protection of the Constitution of the United States of America.

If the Legislature of the State of Texas had passed an act which would authorize physical attacks and assaults upon Miss McCullagh, there is no doubt but that this Court would readily come to her aid in the protection of her person or physical being. Should the rule be any different where, through a vulgar and grotesque caricature, her feelings and finer sensibilities have been assaulted and abused and her professional reputation damaged.

The only argument that can be asserted against a right of privacy is that it is new and has only been discovered in the last half century. The concept of natural rights gives recognition to the spiritual nature of mankind. Human rights are the growth of civilization. If we cannot recognize the newly discovered rights of the individual and protect them as they appear in the growth of civilization, then we have retogressed instead of progressed in the stream of civilization. We have lost our spiritual concept and our

belief in the dignity of human life. Is it a part of our present moral and spiritual code that any person, and particularly a lone woman, may be publicly insulted and ridiculed? Does this Court subscribe to the view that any state in the Union can loose the hounds of ridicule with impugnity? The power of ridicule is a powerful weapon which often marks individuals for life, and so humiliates an individual that his self-assurance and public usefulness are destroyed.

When a man's personal dignity is destroyed, he is robbed of public respect. We submit that there is no more treasured or valuable right of an individual than the right to live in dignity with his fellow man. To deprive a person of this right is to deprive him of his natural liberty and equal protection under the law. Ottherwise, an individual could neither maintain self-respect nor command the respect of others. It is a matter of grave concern that a Court of Appeals of the United States has held that more than trivial public ridicule of a private individual is non-actionable, and particularly so where the victim is a single and unprotected woman. This decision extends a license to every publication in the United States and to every yellow sheet in the country, to humiliate individuals at will with no other purpose than to create coarse and vulgar merriment at the expense of the victim.

Decisions Defining Right of Privacy As A Fundamental Right

An invasion of the right of privacy has been defined as:

> "* * * the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private

activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person or ordinary sensibilities."

The above definition is one formed by the author of a note in 138 A.L.R. 22, and has been cited and adopted by the Indiana Appellate Courts in the case of CONTINENTAL OPTICAL COMPANY v. REED, 86 N.E. 2d 306, 14 A.L.R. 2d 743.

There are annotations covering this subject in 14 A.L.R. 2d 743; 138 A.L.R. 24; and 168 A.L.R. 448.

The Restatement of the LAW OF TORTS formulated definition as follows, Sec. 867, page 398:

"A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."

We feel that the Court will be aided by the article in 30 TEXAS LAW REVIEW at page 640. This article cites cases showing the divisions into which the action for right of privacy may be grouped. We quote from that article:

"Publications without consent which are not libelous but which are offensive or humiliating or tend to injure one's social standing in the community are sometimes considered invasions of the right of privacy. Thus, the publication of a person's picture in connection with a crime story which was not current news was held to be a violation of his right of privacy. Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P. 2d 133 (1945). The publishing of plaintiff's photograph with a caption implying that they were guilty of an unde-

sirable kind of love was also held actionable. Gill vs. Curtis Pub. Co., 231 P. 2d 565 (Cal. App. 1951). A third example of this type of publication is that involved in Barber v. Time, Inc., 348 Mo. 1199, 159 S.W. 2d 291 (1942), where the defendant published over the caption 'Starving Glutton,' a photograph of the plaintiff, a hunger victim, in her hospital bed. See also Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948); Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927)."

We feel that this Court is confronted with the same situation as was in the court in HINISH v. MEIER & FRANK COMPANY, 166 Oregon 482; 113 Pc. 2d 438; and we feel that this Court should follow that court's decision from which we quote:

"Our consideration of the subject leads us to the conclusion *that natural justice and the needs of the society* in which we live should prevail over objections based upon the novelty of the asserted cause of action. It is time that fictions be abandoned and the real character of the injury be frankly avowed. When Brandeis and Warren wrote in 1890, it was the unseemly intrusions of a portion of the press into the privacy of the home that was emphasized as the main source of evil; since then motion pictures and the radio have been perfected and have taken their place amoung our great industries, while instantaneous photography today accomplishes miracles scercely dreamed of fifty years ago. Thus, the potentialities for this character of wrong are now greatly multiplied. A decision against the right of privacy would be nothing less than an invitation to those so inclined who control these instrumentalities of communication, information and education, *to put them to base uses, with complete immunity, and without regard to the hurt done to the sensibilities of individuals*

whose private affairs might be exploited, whether out of malice or for selfish purposes.

"We should not be deterred by fear of being accused of judicial legislation. Much of our law is judge-made, and there are those who think that it is the best law. Cardozo, 'The Growth of the Law', p. 133. The common law's capacity to discover and apply remedies for acknowledged wrongs without waiting on legislation is one of its cardinal virtues." (Emphasis ours).

The leading case on libel or invasion of the right of privacy through caraicature is BURTON v. CROWELL PUBLISHING COMPANY, 82 F. 2d 154. In this case the trial court dismissed the case on the ground that the grotesque and monstrous character of the caricature did not hold the plaintiff up to hatred, ridicule, or contempt. This decision was reversed by the Circuit Court of Appeals which held that the publication had damaged plaintiff's reputation and that the victim of such a libel may become known by it and associated with it indefinitely.

The Court held that it exposed the sufferer to ridicule and contempt. The Circuit Court of Appeals in an opinion by Justice L. Hand cited most of the caricature cases. The Court had the same difficulty in that case as we have in this case, in that the caricature did not in express words impugn the character of the plaintiff. The Court made the following comment:

"It would be hard for words so guarded to carry any sting, but the same is not true of caricatures, and this is an example; for, notwithstanding all we have just said, it exposed the plaintiff to overwhelming ridicule. The contrast between the drawn and serious face and the accompanying fantastic and lewd deformity was

so extravagant that, though utterly unfair, it in fact made of the plaintiff a preposterously ridiculous spectacle; and the obvious mistake only added to the amusement. *Had such a picture been deliberately produced, surely every right-minded person would agree that he would have had a genuine grievance;* and the effect is the same whether it is deliberate or not. Such a caricature affects a man's reputation, if by that it is meant his position in the minds of others; the association so established may be beyond repair. *He may become known indefinitely as the absurd victim of this unhappy mischance.*" (Emphasis ours).

* * *

"But the interest here is by hypothesis one which the law does protect; the plaintiff has been substantially enough ridiculed to be in a position to complain. The defendant must therefore find some excuse, and truth would be an excuse if it could be pleaded. The only reason why the law makes truth a defense is not because a libel must be false, but because the utterance of truth is in all circumstances an interest paramount to reputation; it is like a privileged communication, which is privileged only because the law prefers it conditionally to reputation. When there is no such countervailing interest, there is no excuse; and that is the situation here. In conclusion therefore we hold that because the picture taken with the legends was calculated to expose the plaintiff to more than trivial ridicule, it was prima facie actionable; that the fact that it did not assume to state a fact or an opinion is irrelevant; and that in consequence the publication is actionable."

We are unable to find where the right of privacy or the right to be free from public ridicule has ever been discussed by this Court.

The last case cited by the Supreme Court of Oregon is

based upon the right of privacy as a natural right, and we now desire to review the history of the Ninth Amendment to the Constitution to show that this constitutional guarantee extends to this fundamental and inherent right.

Discussion of History and Meaning of the Ninth Amendment

It is very difficult to understand the full importance of the Ninth Amendment without an understanding of its historical background and this we shall attempt briefly to trace.

The real force and effect of the Ninth Amendment has been most unfortunately lost through a series of decisions by our Courts which have placed it in the same categorie and classification as the first eight amendments in the Bill of Rights. The Ninth Amendment has lived under a cloud, but the cloud has been removed since, as we shall later point out, this Court now holds that the Bill of Rights consist only of the first eight amendments to the Constitution.

The suggestin of a bill of rights first arose in the constitutional convention, but it was voted down because the government of the United States was conceived solely as a government of delegated powers. The members of the convention thought that basic natural and fundamental individual rights were self-evident and did not need to be enumerated. The fight over the inclusion of the Bill of Rights came in the ratification conventions of the several states.

In an effort to reassure the people that their personal liberties were not endangered through the omission of a bill of rights in the Constitution, Alexander Hamilton in "The Federalist" made the following comment:

> "I go further and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power."

This reasoning on the part of Alexander Hamilton as contained in "The Federalist", did not reassure the opposition nor did it allay the fears of those who were proponents of a bill of rights. On the other hand, it seemed to excite their suspicions to a greater degree, and to reinforce their determination. This statement on the part of Hamilton was, in all probability, the actual cause of the insertion of the Ninth Amendment in the Constitution of the United States. It was this statement by Hamilton which caused Madison to include in his proposals of amendments, the clause which, when rewritten, ultimately became the Ninth Amendment.

Our view with respect to this matter is shared by Storey who makes the following comment:

> "This clause was manifestly introduced to prevent any perverse or ingenious misapprehension of the well-known maxim that an affirmation in particular cases implies an affirmation in all others. The maxim, rightly

understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of 'The Federalist' on the subject of a general Bill of Rights."

In Madison's proposals of amendments to the Constitution made in the First Congress, we find the ninth clause of the fourth proposal as follows:

"The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."

Madison's reason for the introduction of this clause into the proposed amendments was stated on June 8, 1789 in his explanation of his proposals in the following language:

"It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow, by implication, that those rights which were not signaled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against, I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution." (GALES AND SEATON'S ANNALS OF CONGRESS, Volume 1, page .

The exact language of the Ninth Amendment appears thereafter in the report of the drafting committee of eleven members, one from each state.

We notice that the words "the exceptions here or elsewhere in the Constitution" were stricken in the committee's report because at that time it was intended that the amendments would be interwoven into the body of the Constitution, and were not intended to appear as an appendage. When the House of Representatives reversed itself on a third vote and agreed that the amendments would appear as an appendage to the Constitution, the words "here or elsewhere in the Constitution" were omitted because of the prior abridgment of the language of the amendment by the committee. It is obvious, though, that the clause was intended as a general declaration of natural human rights rather than to have a limited reference to the first eight amendments only.

There was little or no discussion in the House of Representatives, but the Senate added an important preamble to the amendments as follows:

> "The conventions of a number of the states having at the time of their adopting the constitution expressed a desire, in order to prevent misconstruction or abuse of its powers that further *declaratory and restricted* clauses should be added; and as extending the ground of public confidence in the government or best ensure the beneficent ends of its institution." (Emphasis ours).

The important language of this preamble are the words "further declaratory and restricted clauses." This language

clearly shows that the Senate of the United States, and the House of Representatives in concurring in said preamble, fully realized and understood that at least a part of the twelve proposed amendments were not *restrictive* provisions, but were *declaratory* provisions. This is the part which we want to forcibly drive home. The present Ninth and Tenth Amendments to the Constitution, which were the Eleventh and Twelfth proposed amendments, were not considered in the same light as proposals three to ten, inclusive, and were not considered as restrictive clauses, but on the other hand were regarded as declarations of principles. This preamble does not ordinarily appear on the conventional printing but is found on the original in the Library of Congress.

However, the amendment was Madison's work and his interpretation should be controlling.

Obvious Meaning of the Ninth Amendment

The Ninth Amendment to the Constitution is a basic statement of the inherent natural rights of the individual. On its face this amendment states that there are certain unenumerated rights that are retained by the people. Nothing could be clearer than this statement.

The concept of individual sovereignty and supremacy in the realm of natural and inherent rights and liberties was not a creature of the Constitution of the United States. This basic concept of individual liberty was absolute in the theory of American Government from the very beginning.

This idea has been aptly expressed in 16 C.J.S., page 578, paragraph 199, as follows:

"The Constitutions are not the sources of our personal rights. Our theory of government is that the people, in full possession of inherent, inalienable rights, have formed the government in order to protect these rights, and have incorporated them into the organic law as a shield against unwarrantable interference by any department of government."

City of Dallas v. Mitchell, 245 S.W. 944;
Spann v. City of Dallas, 111 Tex. 350, 212 S.W. 513;
Gow v. Bingham, 107 N.Y.S. 1011;
City of Pineville v. Marshall, 299 S.W. 1072, 222 Ky. 4.

The belief in natural rights was summarized in the preamble to the Declaration of Independence which declares that men are endowed under the laws of nature and by nature's God with certain unalienable rights. The preamble to the Declaration of Independence followed the language of Article One of the Virginia Bill of Rights adopted by the convention of delegates on June 12, 1776.

Natural rights and the liberty of the individual are the basis of our democratic form of government. It seems obvious that the framers of the Constitution, as well as the framers of the Bill of Rights, were merely assuring these rights against a strong centralized government, and that they felt that they were definitely assured of the safety of these rights at the hands of State Governments. It was the last thought in their minds that by protecting natural rights against the power of the National Government, they were thereby surrendering their natural rights to State Governments. It was not their intention then and it is not the purpose of the people to do so at this time. There is nothing in the Constitution which gives the Federal Gov-

ernment the right to destroy inherent individual rights, and there should be nothing which would permit the State Governments to do so.

Judicial Construction of the Ninth Amendment

There has been no decision by any Court in the United States which has ever yet found one of the unenumerated rights. The Ninth Amendment has always been glossed over and has rarerly ever received careful attention. This is true particularly when rights under the Ninth Amendment have been asserted against the action of one of the forty-eight states. This is probably due to the mechanical error which is found in the decision of Livingston v. Moore, 7 Peters 469, (551) (1833). We recall that the Bill of rights was not known by that name until many years after the adoption of the amendments, and the amendments were referred to as "Articles of Amendment". As we have before pointed out, twelve articles of amendments were submitted to the people by the First Congress. The first related to per capita representation in Congress, and the second related to salaries of certain officers. These two amendments were never approved by the legislatures of the several states, and consequently never became a part of the Constitution. This early decision above cited discusses the "Ninth Amendment", when in fact the opinion actually has the Seventh Amendment relating to trial by jury under consideration.

This mechanical error is most effectively pointed out in "The Constitution of the United States of America," page 711, which is a volume compiled by the Library of Congress in compliance with Senate concurrent resolution No. 35 adopted May 14, 1936.

This mechanical error has been probably a great cause in the erroneous classification of this amendment as not applying to State Governments but applying only to the Federal Government.

Beginning with BARRON v. BALTIMORE, 7 Peters 243, 8 L. Ed. 672, there has been a long line of cases holding that the *first "ten" amendments* to the Constitution were exclusively restrictions upon the Federal Government. These cases generally state that the prohibition contained in the amendments were designed solely as limitations upon the Federal Government, and not as limitations upon State Governments. We also see that the first eight amendments to the Constitution deal solely with prohibitions, but the Ninth Amendment is not a prohibition at all, but a declaration.

All of these cases are generalizations, and may be classed as dicta because they do not specifically relate to the Ninth Amendment, but only to some specific prohibition contained in the first eight amendments. Among these decisions, there is no case which specifically discusses the Ninth Amendment.

In EILENBECKER v. DISTRICT COURT OF PLYMOUTH COUNTY, IOWA, 134 U.S. 131, 33 L. Ed. 803, decided in 1890, in an opinion by Justice Miller, the Supreme Court of the United States for the first time announced that only the first eight Articles of Amendment had reference to the powers exercised by the government of the United States and not to those of the states.

This new interpretation limiting the rule of prohibition to the first eight articles of the amendments was announced thereafter in several other decisions, as follows:

Brown v. Walker, 161 U.S. 591, 40 L. Ed. 819 (824); in an opinion by Justice Brown, decided in 1895;
Holden v. Hardy, 169 U.S. 366, 18 S. Ct. 383, 42 L. Ed. 780 (787); in an opinion by Justice Brown;
Bolin v. Nebraska, 176 U.S. 83, 44 L. Ed. 382 (384); in an opinion by Justice Brown, decided in 1899;
Ohio v. Dollison, 194 U.S. 445, 48 L. Ed. 1062 (1065); in an opinion by Justice McKenna, decided in 1903;
Palko v. Connecticut, 302 U.S. 319, 82 L. Ed. 288, in an opinion by Mr. Justice Cardoza.

There is nothing specific in the foregoing cases. The Ninth Amendment is not directly discussed. We see, however, that the United States Supreme Court is not bound to any construction of the Ninth Amendment which would limit its application to the Federal Government. On the contrary, the decisions last quoted may be cited to sustain authority for the distinction which this Court makes between the first eight amendments and the Ninth and Tenth Amendments. The departure from the prior dicta would indicate that the Supreme Court would apply a different rule to the Ninth Amendment.

The Ninth Amendment has been discussed specifically only in the following cases, and in no case has there been an establishment of any of the unenumerated rights.

United Public Workers v. Mitchell, 330 U.S. 75, 91 L. Ed. 754 (1770), in which the Hatch Act was construed;
Whelchel v. McDonald, 176 F. 2d 260, affirmed by the Supreme Court 340 U.S. 122, 95 L. Ed. 141;
Woods v. Miller, 333 U.S. 138, 92 L. Ed. 596;
Tennessee Electric Power Company v. Tennessee Valley Authority, 306 U.S. 118, 83 L. Ed. 543;
National Maritime Union v. Herzog, 78 F. Supp. 146,

affirmed by the Supreme Court of the United States in a memorandum decision in 92 L. Ed. 1776;
Ex Parte Kirth, 28 F. Supp. 258;
Commonwealth & Southern v. Securities and Exchange Commission, 134 F. 2d 747;
United States v. Painters Local Union No. 481, 79 F. Supp. 516;
Gernatt v. Huiet, Commissioner of Labor, 192 Georgia 729, 16 S.E. 2d 587, (1941) by the Supreme Court of Georgia;
State v. Michel, 46 So. 430, 121 La. 374 (1908) by the Supreme Court of Louisiana.

After careful search we have been unable to find any other decision by any court, either State or Federal, which directly discusses the applicability of the Ninth Amendment. The decisions of our courts to this date throw very little light upon its meaning.

Our courts, however, are deeply concerned over the doctrine of fundamental rights, the common law rights of man, the rights of natural endowment or by what other name they may be called. Our Supreme Court in the last few decades has definitely shown their belief that there should be some protection for the unalienable and unenumerated rights of the people.

Many fundamental and inherent rights have been protected under the due process clause of the Fourteenth Amendment. It may be that a consideration of the office of the Ninth Amendment in connection therewith may be felt by the Court to be of great importance.

We do see, however, that there has been nothing in judicial interpretation to destroy the meaning and effect of the Ninth Amendment, and it is available for use whenever one

of the unenumerated rights shall be discovered and asserted. We urge that the right of privacy and the right to be free from public ridicule and the right to live in dignity with our fellow man is one of the unenumerated rights. We also see that there are no decisions by any of the courts, either Federal or State, which are not in agreement with our theory that rights of natural endowment are universal, and since such rights exist, they cannot be destroyed by the government of the several states. On the contrary, the later decisions of the Supreme Court of the United States seem, in general language, to support our position.

Importance of Savings & Loan Association v. Topeka

In the oral argument of this case before the Court of Appeals, the Chief Judge of the Court stated that he felt that the recognition and approval of our theory of the meaning and applicability of the Ninth Amendment should be a matter that should first be decided by the Supreme Court of the United States rather than by a Court of Appeals. The question of the vindication of one of the unenumerated rights as against state law seem to be the basis of this comment, since such a decision might require that a decision of the state court or a Texas statute, which refuses to give recognition to the right of privacy, must be declared unconstitutional.

We believe that the decision in the case of Savings & Loan Association v. Topeka, 87 U.S. 686, 22 L. Ed. 455, announces not only the spirit but the letter of the Ninth Amendment. This decision was after the enactment of the Fourteenth Amendment. The City of Topeka, in an endeavor to build an industrial city, had issued bonds which

were payable out of the public treasury for the purpose of inducing King Wrought Iron Bridge Manufacturing & Iron Works Company to establish a factory in the City of Topeka. This constituted the taking of private property through taxation and giving it to private industry. This was done under the force of a statute of the State of Kansas which authorized such a procedure, and the statutes of the State of Kansas had been fully complied with. The question before the Supreme Court of the United States was whether or not the statutute of the State of Kansas was constitutional or unconstitutional.

In an opinion by Justice Miller, with a dissent by Justice Clifford which we shall hereafter mention, the Court quickly disposed of the question and held without specific reference to any provision in the Constitution of the United States, or any of the articles of amendment thereto, that the statute of the State of Kansas was unconstitutional. The opinion contained the following language:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such right, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many.
>
> "The theory of our governments, state and national,

is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. Whiting v. Fond du Lac. 25 Wis., 188; Cooley, Const. Lim., 129, 175, 487; Dill. Mun. Cor., § 587.

"* * * To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

It is vitally significant and important that the majority opinion was based, not upon the interpretation of any constitutional provision, but upon the basis of the fundamental right of an individual to retain his own property against taxation for the support of private industry.

The question of inherent or fundamental rights was directly before the courts and Justice Clifford dissented, using the following language:

"Courts cannot nullify an Act of the State Legislature on the vague ground that they think it opposed to

a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implication of the instrument disclose any such restriction.

"Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the Constitution and the people, and convert the government into a judicial despotism.

"* * * Because it is not competent for a Federal Court to adjudge a State statute void which does not conflict in any respect with the Constitution of the United States or that of the State whose Legislature enacted the statute."

This case supports us in the very substance of our position with respect to the force and meaning of the Ninth Amendment to the Constitution. The exact question was decided, as demonstrated by the dissenting opinion of Justice Clifford.

We again point out that Justice Miller was a member of the Court which first declared that the Bill of Rights consisted of the first *eight* articles of amendment to the Constitution instead of the first ten articles of amendment.

This decision has been recognized as the law of decision, holding that the Supreme Court of the United States can declare an Act of a state legislature void, if the state statute is violative of fundamental rights by exacting taxation and making a gift of tax money to private industry.

Everson v. Board of Education, 330 U.S. 1, 91 L. Ed. 711 (718);
Thompson v. Consolidated Gas Utilities Corporation, 300 U.S. 55, 81 L. Ed. 510, 57 S. Ct. 364;
Parkersburg v. Brown, 106 U.S. 487, 27 L. Ed. 238, 1 S. C. 442.

In NATIONAL LABOR RELATIONS BOARD v. JONES AND LAUGHLIN STEEL CORPORATION, 81 L. Ed. 893 (909), 301 U.S. 1, the Supreme Court of the United States, in an opinion by Justice Hughes, defined one of the fundamental rights. The Court held that employees had as clear a right to self-organization and selection of their representatives for lawful purposes as a business has to select its officers and agents. This is Supreme Court authority for the existence of fundamental unenumerated rights. In this case the Supreme Court, speaking through Chief Justice Hughes (page 909), stated:

> "Thus in its present application, the statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.
>
> "*That is a fundamental right.* Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority." (Emphasis ours).

We have purposely italicized the statement "That is a fundamental right."

The case of CALDER v. BULL, 3 Dallas 386, 1 L. Ed. 648, shows the philosophy of our early Supreme Court with respect to basic and inherent rights of individuals. This case has not been ever directly repudiated, but there has been instances in which the Supreme Court has expressed some

doubt as to some of the dicta contained therein. However, it has been cited on a number of occasions by the Supreme Court with approval.

However, SAVINGS & LOAN ASSOCIATION v. TOPEKA is now controlling law and is ample authority for the protection of inherent and fundamental rights.

THE NINTH AMENDMENT IS APPLICABLE TO STATE GOVERNMENTS AND IS NOT SOLELY A RESTRICTION ON FEDERAL GOVERNMENT.

It is true that this amendment was among the amendments that were added to the Constitution, and the reason of its addition was because of the fear of the people of a strong National Government. However, we must not discount or detract from the basic and underlying meaning of the Ninth Amendment, simply because of the historic reasons for its final inclusion in the Constitution of the United States. Irrespective of whether it was included in the original Constitution or in the Amendments, or whether it was omitted entirely, its great principle has always existed, and always will exist as long as there is human life.

We must not discount or limit its meaning because of the circumstances which made it a part of the Constitution.

However, the following reasons definitely establish that the Ninth Amendment was not intended solely as a restrictive inhibition against National Government, but that it was a declaration of the liberty of mankind:

(1) The very language of the amendment negatives such an idea. The words "the enumeration in the Constitution" definitely show that the language of general import, as applied generally to the Constitution, instead of special import,

and restricted only to the first ten amendments. If a narrower construction had been intended, the amendment would have read "the enumeration *in these amendments*". We bear in mind the fact that the body of the Constitution spelled out and protected a number of other basic individual rights.

It would therefore seem unreasonable that certain basic rights would have been defined and itemized in the main body of the Constitution without the necessity of the safeguard of the Ninth Amendment, whereas others of equal importance would have required such a safeguard.

Therefore, we believe that the inclusion of the words "in the Constitution" definitely establish that the amendment was an amendment of general application.

(2) Opinions of the Supreme Court of the United States from the years 1890 to 1903 definitely show that in later years only the first eight amendments to the Constitution were intended to have the narrow construction as inhibitions upon the National Government.

Since the case of EILENBACKER v. THE DISTRICT COURT OF PLYMOUTH COUNTY, IOWA, 134 U.S. 131, 33 L. Ed. 803, there has been no case and no dictum of the Supreme Court of the United States which has adhered to the old dictum. Therefore, the Ninth Amendment is unshackled from its time-worn precedent, and is ready for use at any time our courts or our legislatures discover an unenumerated human right.

(3) The historic legislative background of the amendment shows definitely that Madison, who was the father of both the Constitution and the Bill of Rights, and the particular author of the Ninth Amendment, never intended that it should ever be so narrowly restricted. Without repeti-

tion of its historic background the fact that the original draft showed that the language "here or elsewhere" in the Constitution, coupled with the fact that Madison never intended that the amendments to the Constitution would appear as an appendage hereto, definitely prove that this amendment was always intended to be a broad declaration relating to the Constitution as a whole without any narrow or restricted construction.

(4) The preamble to the twelve proposed articles of amendment in the use of the language "Further Declaratory and Restricted Clauses should be added", definitely show that of the twelve amendments submitted for ratification, some were considered by the Congress of the United States, and particularly the Senate, as being broad declarations rather than restrictive inhibitions. The first and second proposed amendments relating to per capita representation and salaries of government officers, certainly could not be classed under the language of "declaratory" clauses. Undoubtedly the Senate and the House of Representatives realized the distinction between the first eight amendments to the Constitution, and amendments Numbers Nine and Ten as ultimately adopted. This introductory clause, which seldom if ever appears on the conventional printing of the Bill of Rights, but which does appear upon the original in the archives of the Library of Congress is very convincing.

(5) However, we do not need the preamble to immediately recognize the difference between the first eight amendments and the Ninth and Tenth Amendments. The first eight amendments are negative in their statements and of course can be classified no other way than with a restrictive intent.

No stretch of the imagination could ever convert a broad declaration of human liberty into any kind of a restriction.

(6) The broad and historic concept of human rights and human liberty establish such unenumerated rights as pre-constitutional rights, and such rights were not abridged by the Constitution of the United States, or any State Constitution, or any power or Government or person whomsoever, or wherever situated.

If a right is not universally recognized, it is not a right at all.

(7) And most important, the interpretation of this amendment as solely a restriction upon the Federal Government would rob the amendment of its meaning entirely. A proper interpretation of this amendment then would be that the people have unenumerated rights but that the several states reserve to themselves the right to deny or disparage such rights. It is unreasonable to assume that the framers of the Constitution would have so jealously guarded the rights and privileges of the individual as against the National Government, for the sole and only purpose of providing that these identical rights could be destroyed by the people of the several states, thus leaving it uncertain as to whether or not freedom would be universal in this republic.

The Ninth Amendment Protects Newly-Discovered Rights.

It is our belief that the philosophy of the Ninth Amendment is a living and growing philosophy. It was intended to be so in the same manner that the Magna Charta was intended and has been interpreted as part of a living and growing constitution. The Magna Charta has not been restricted by English law to the rights of Englishmen as they existed in 1215 on the field at Runnymede. In the same

manner the natural rights of Americans should not be static and fixed as of the date of the adoption of the Constitution and the Bill of Rights.

> **To interpret the Ninth Amendment in this manner would take it out of its clearly intended meaning. Such an interpretation would mean that there was a cutoff date at the time of the adoption of the Bill of Rights; that prior to that date rights of natural endowment were recognized, but after said date only such rights as were enumerated or known to exist would be protected. This interpretation, therefore, destroys the meaning of the words "unenumerated" and restricts its meaning to be read as "such rights as are enumerated, and such rights as are now known to exist."**

We can only see from the stream of history that human rights are the growth of civilization. It was never intended that civilization in other phases of life would progress, but that human liberty and rights of natural endowment can only be defined as they existed almost two centuries ago, and that however apparent such a right may become in the light of current history, such a natural right could never be recognized except by a constitutional amendment. We do not believe that it was ever intended that the science of the law should become so fixed and archaic, while all other sciences may go forward in the discovery of truth and may utilize it wherever it is found.

The law is necessarily built upon retrospect and is founded upon tradition. It is difficult for such a science to keep abreast and maintain progress with other business and professions. There are those who urge that this is a weakness of the system of the English common law, and that in an expanding world of business and commerce in the machine

age, we must ultimately come to a system codification or a system of justice which is more visibly defined and executed.

With this view we do not agree, but we believe that although the demands of a fast moving business world require a large degree of codification and visible certainty, and the laws relating to property must in a great manner be fixed and static, the rule should be different in the field of human relationships.

As we become more civilized and evolved, we learn more about the natural forces of the world, such as the use and properties of our elementary minerals, steam, electricity, and other natural forces. We also increase in spiritual and intellectual growth and are capable of understanding natural rights and liberties that have always existed, but which have been beyond our limited intellect to comprehend.

We believe that many of the great and underlying truths of human nature and social justice are yet to be discovered, in the same manner that we are from year to year expanding our knowledge of the natural and physical forces of the Universe. The framers of our Constitution and the signers of the Declaration of Independence actually understood, defended and vindicated human rights to the greatest extent that they had ever been recognized up to that time. However, they did not have the entire conception of human rights as we understand them today. We ourselves cannot possibly have any conception of what natural and human rights may be, in the light of the progress and development of the race, after a century or two centuries of civilization and intellectual and spiritual growth. We cannot doubt this when we remember that less than a century ago we permitted slavery and human bondage and did not consider

slavery as being morally or spiritually wrong; and when we further remember that a little more than a quarter of a century ago we liberated women from political bondage and gave them a right to participate in the government. These examples illustrate the changes in our moral philosophies that have taken place in the short era of a century.

Two centuries ago citizens were tortured for witchcraft.

Our thesis is that human rights which are not enumerated in the Constitution will unfold and become apparent as they will be revealed in the future and it is within the spirit of the Constitution and the letter of the Ninth Amendment that these rights should be recognized and protected.

There must be some unenumerated rights. The Ninth Amendment must be given some meaning. Its value and meaning should not be lost through disuse.

We believe that this Honorable Court will find the Ninth Amendment worthy of its consideration, and that it will be worth its while to carefully weigh whether or not the petitioner's right of privacy and the right to be free from public ridicule and caricature and her right to live in dignity and public respect are fundamental and inherent rights which cannot be denied or disparaged by any government, either State or Federal.

Argument and Authorities Under Point 2

Point No. 2

(Pertinent to questions 5 and 6 presented for review).

The Court of Appeals and the District Court erred in holding that plaintiff's petition did not allege an injury to petitioner's reputation, and in holding that

under Texas law ridicule alone would not support an action for libel unless the honesty, integrity, or virtue of petitioner had been impeached.

It is the holding of both the Court of Appeals and the trial court that Miss McCullagh may have been made the subject of some ridicule, but that ridicule alone does not give rise to a cause of action for libel. Both courts further held that there can be no libel unless the publication impeaches her reputation for honesty, integrity, or virtue.

These rulings are erroneous because paragraphs 6, 7, and 8 of plaintiff's petition (R. 26-28) expressly allege that she had a high reputation for unusual skill and ability as an instructor in ballroom dancing, and that the ridicule damaged her in her profession and calling, and caused her to suffer great and substantial loss in her prestige as a dancing instructor. She also alleged that the embarrassment and humiliation caused her to be unable to continue teaching ballroom dancing in Houston, and that she had suffered physical and nervous illness and mental pain and anguish. It is difficult to explain the apparent or to illustrate the obvious. A careful reading of plaintiff's trial pleading or petition definitely shows that both courts committed error.

Both lower courts also erred when they held that ridicule alone will not support an action for libel. The very wording of the Texas statute shows that ridicule constitutes libel, which statute reads as follows:

> "A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby

> expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury. Acts, 1901, p. 30." VERNON'S CIVIL STATUTES, No. 16, p. 7.

Both lower courts reasoned erroneously that if the publication only ridiculed the plaintiff, there could be no injury to her reputation unless her moral reputation for honesty, integrity, or virtue were impugned. This restricted consideration of the word "reputation" does not take into consideration the damage to a person's professional or business reputation through ridicule. Neither have the Texas courts so limited the use of the word "ridicule".

In HOUSTON PRINTING COMPANY v. MOULDEN, 41 S.W. 381, the court stated the following:

> "The words need not necessarily impute disgraceful conduct to the plaintiff. It is sufficient if they render him contemptible or ridiculous. * * * And so, too, are all words which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which thus, by engendering an evil opinion of him in the minds of right-thinking men, tend to deprive him of friendly intercourse and society. But any definition may not be entirely exact so as to contain all that libel may include, and one author condemns all attempted definitions."

The latest decision by the Supreme Court of Texas defining libel is BELL PUBLISHING COMPANY v. GARRETT ENGINEERING CO., 141 Tex. 51, (59), 170 S.W. 2d 197. In this case the court adopted the statement found in Restatement of the Law as follows:

"Sec. 569. The publication of any libel is actionable per se, that is irrespective of whether any special harm has been caused to the plaintiff's reputation or otherwise. Such a publication is itself an injury, and therefore a sufficient ground for recovery of at least nominal damages.

* * *

"Comment c. Damages. *Although actual harm to the reputation is not necessary to the actionable character of such defamation,* the jury may take into consideration any loss of reputation sustained by the other in determining the amount of its verdict." (Emphasis ours).

The court has improperly cited GUISTI v. GALVESTON TRIBUNE, 105 Tex. 497, 152 S.W. 167, as supporting its holdings because the Supreme Court of Texas in RENFRO DRUG CO. v. LAWSON, 138 Tex. 434, 160 S.W. 2d 246, in discussing the GUISTI case shows that it is authority for our contention, as follows:

"It means rather that, if the publication is a defamation as defined in the statute, injury to the reputation of the person defamed is presumed, and that, with that injury presumed, the mental anguish of the person defamed may be taken into consideration in awarding damages.

* * *

"It is immaterial that the article did not charge plaintiff with the commission of crime in the sense of violating the penal laws of this state, for it is no longer essential to constitute a publication libelous that it should charge an offense denounced by the Penal Code of the state or by the common law, but it is sufficient if the written or printed defamation *tends to subject*

plaintiff to public contempt or impeaches her integrity or reputation." (Emphasis ours).

In McDAVID v. HOUSTON CHRONICLE PRINTING CO., 146 S.W. 252, the plaintiff was accused by the present respondent in another case as being a manly woman and one who attempted to be master of her household and keep her husband in subjection. The same contention was made that there was no libel because her chastity or honesty were not impugned, and hence her reputation was not damaged. This contention was quickly overruled by the court.

In WALKER v. SAN ANTONIO LIGHT PUBLISHING COMPANY, 70 S.W. 555, the plaintiff was accused of having been publicly caned by an actress on Broadway. The court held that this publication held the plaintiff up to contempt and ridicule and was actionable.

In HIBDON v. MOYER, 197 S.W. 1117, damages were awarded for a publication that plaintiff was subject to "brainstorms". He was awarded damages for mental anguish even though there was no other injury or damage.

In ENTERPRISE COMPANY v. ELLIS, 98 S.W. 2d 453, a humorous article about the plaintiff calling the police to find a pet goose which was found alive in plaintiff's oven, was held libelous. The court awarded damages for mental suffering caused by subjecting one to humiliation and ridicule even though no other damages were present.

From the foregoing it is readily seen that a person's reputation has been damaged if that person is held up to public ridicule and contempt.

Since the Texas courts have adopted the Restatement of the Law, a good definition is found in "THE RESTATEMENT OF TORTS", paragraph 559, in which it is stated:

"A communication is defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third parties from associating or dealing with him.

"The word 'communication' is used to denote the fact that one person has brought an idea to the perception of another. As to the distinction between a 'communication' and a 'publication',

"Type of disparagement. Communications are often defamatory because they tend to expose another to hatred, ridicule or contempt."

The only case cited to support the court is SNIDER v. LEATHERWOOD, 49 S.W. 2d 1107, which is a case by the Court of Civil Appeals in which an application for writ of error was dismissed, which means that it does not constitute authority in the State of Texas. A decision of a Court of Civil Appeals in Texas does not constitute authority where the writ is only "dismissed" and not "refused".

We therefore urge that the Court of Appeals definitely erred in this regard.

Argument and Authorities Under Point 3

Point No. 3

The Court of Appeals erred in holding that a cause of action for violation of the privacy does not exist in Texas.

The Court of Appeals rested its decision and holding that there was no such thing as a right of privacy in Texas,

upon MILNER v. RED RIVER VALLEY PUBLISHING CO., 249 S.W. 2d 227. No application for writ of error was filed with the Supreme Court of Texas in this case, and therefore it does not have Supreme Court authority. This case, however, is only authority for the proposition that a right of privacy cannot exist in a deceased person, and that the survivors of a dead person cannot claim damages for unwarranted publications with respect to a deceased person, particularly if the facts published are true. This case is no authority for holding that a living person has no right of privacy in Texas.

On the other hand, as we have pointed out, in U. S. LIFE INSURANCE COMPANY v. HAMILTON, 238 S.W. 2d 289, another Court of Civil Appeals inclined to the view that the courts of this state should recognize the wrongful invasion of such right.

The right of privacy is further impliedly recognized in MEADOWS v. FIRST NATIONAL BANK OF HARLINGEN, 149 S.W. 2d 591 (593) and LOVEJOY v. MUTUAL BROADCASTING SYSTEM, ET AL., 220 S.W. 2d 308, 313).

The case of MILNER v. RED RIVER VALLEY PUBLISHING COMPANY, upon which the Court of Appeals has relied, rested not so much upon the recognition of the right of privacy, but upon the grossly shocking and erroneous statement that our Texas courts are limited to the enforcement of rights under the common law as it existed on January 20, 1840, unless changed, modified, added to, or repealed by statute. As authority for this proposal, Article 1 of the

REVISED CIVIL STATUTES OF TEXAS was quoted as authority:

> "The common law of England, so far as it is not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature."

MILNER v. RED RIVER VALLEY PUBLISHING COMPANY has been unfavorably commented upon many times. For example, the article written by Warren A. Seavey, Professor of Law of Harvard Law School, found in Volume 31, TEXAS LAW REVIEW, page 309.

This decision would undoubtedly have been repudiated by the Supreme Court of Texas if an appeal had been had to that Court. The proposition stated is grossly incorrect, as demonstrated by the fact that Texas law recognizes common law marriages, adoption by verbal agreement and common law status, recovery of damages for mental anguish, manufacturer's liability, and numerous other well-recognized rights which were unknown to the English common law.

We feel that the Supreme Court of Texas has held that the proper interpretation of Article 1, REVISED STATUTES, should be that our courts will follow the common law system, or the law of precedent and decision, rather than the Spanish Civil Law or Code Law, until the Legislature should see fit to alter the same by legislative enactment. GRIGSBY v. REIB, 105 Tex. 597, 153 S.W. 1124; JONES v. GUY, 135 Tex. 398, 143 S.W. 2d 906; HILL v. KIMBALL, 76 Tex. 210, 13 S.W. 59; TAYLOR v. LEONARD, 275 S.W. 134. The courts of Texas do not now, and have never embraced

the doctrine that the common law is a body of law which is not subject to change through decision, but it is a system of laws which are subject to expansion and growth in the light of the current history of its people. The case of MILNER v. RED RIVER VALLEY PUBLISHING CO. is a misfortune to the people of Texas, but it certainly should not be converted through interpretation into a major catastrophe. This erroneous interpretation would convert our system of law into codification instead of common law, which was the very thing which the legislators obviously did not intend to do. They certainly did not intend to adopt the common law on March 16, 1840, and then proceed to murder it by refusing to permit its expansion and growth.

* * *

However, even though the courts and Legislature of Texas may have intended to stop the growth and recognition of the appearance of newly-discovered common law rights and turn back the clock for one hundred and fifteen years, this should not prevent the recognition of inherent and fundamental rights protected under the Ninth Amendment to the Constitution of the United States.

It has never been the theory of our Federal Jurisprudence that there can be no growth in the natural rights of mankind, and no recognition of rights which have been newly discovered and which have appeared since the date of the adoption of the Constitution. On the other hand, the philosophy of our national constitutional law has been a living and growing philosophy. Our constitutional law is not so built on retrospect and so founded on tradition that we cannot recognize the appearance of a right in the light of current history, which, because of our limited experience, intellect, and spiritual growth we had not been able theretofore to comprehend.

For instance, Chief Justice Hughes in NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORPORATION, 81 Law Edition 893 (909), 301 U.S. 1, held that employees had as clear a right to self-organization and selection of their representatives for lawful purposes as a business has to select its officers and agents. He stated "that is a fundamental right". The decisions of the Supreme Court are replete with instances in which a natural right has been vindicated under the due process clause of the Fourteenth Amendment, when such a right could not possibly have been within the conception or understanding of the framers of the Constitution.

The Ninth Amendment is a complete embodiment of the growth and development of natural law, and its proper interpretation will permit the law to remain a part of current history and grow in the same manner that other sciences have grown.

We urge that this case is a case of great consequence, and the decision of this court may be a great step in the vindication of natural liberty and freedom and in sustaining the dignity of individual life which is the very basis and foundation of a democratic society. We again urge that this case is most worthy of the court's consideration.

Argument and Authorities Under Point 4

Point No. 4
(Pertinent to question No. 8).

It was error for the court to refuse plaintiff leave to file her Second Amended Original Petition.

This point of error is presented out of an abundance of

caution. It is our opinion that the filing of the Third Amended Petition which particularly set out the Constitutional questions was not necessary. If Miss McCullagh's constitutional rights were invaded, then this matter, we belive, was a matter of legal argument, or legal reason, why she was entitled to maintain her cause of action. The constitutional questions would follow as a matter of law in determining whether or not under the facts plead she had stated a cause of action.

Prior to entering the order of dismissal, plaintiff requested leave to file her second amended original complaint. (R. 49-57). The court refused to grant leave to file the requested pleading. (R. 58). On the same day the Court entered the order of dismissal for failure to state a cause of action. (R. 58-59).

If the pleading was necessary, however, to carry forward the constitutional questions, then we respectfully assign that it was error for the trial court to refuse to permit the filing of the amended pleading.

A suit should never be dismissed for failure to state a cause of action without giving the plaintiff ample and reasonable time within which to file an amended pleading which does state a cause of action, if such leave is requested by the plaintiff. A dismissal of a complaint for failure to state a cause of action is in effect a summary judgment of dismissal.

We are supported in this contention by the following cases:

Kane v. Chrysler Corporation, 80 F. Supp. 360;
Fulmer v. United States, 83 F. Supp. 137;
Hartmann v. Time, Inc., 64 F. Supp. 671; vacated in part and set aside on other grounds at 166 F. 2d 127.

This last case contains numerous authorities which hold that a summary judgment of dismissal or a motion for summary judgment upon affidavits should not be sustained if it appears that there could be any grounds for filing an amended complaint that would state a cause of action.

Argument and Authorities Under Point 5

Point No. 5

The District Court erred in sustaining Respondent's fourth exception to plaintiff's original petition.

This point of error complains of the error of the trial court in striking from the petition allegations that the language and innuendo of the newsstory and caricature were for the purpose of ridiculing petitioner because of her English citizenship. We contend that this allegation was pertinent and was damaging to plaintiff because it made it appear that she was anti-American, and unsympathetic with the people of the country in which she was residing and in which she was making her living. We feel that it was as much of a libel as any other portion of the newsstory.

Conclusion

WHEREFORE premises considered, Petitioner prays that in view of the errors committed by the Court of Appeals, and the importance of the questions of Federal law and the erroneous decisions of important questions of state law, a writ of certiorari should be granted and petitioner prays

this Honorable Court for the issuance of such writ to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

MISS EVELINE MCCULLAGH,

By: COLE, PATTERSON, COLE & MCDANIEL,

By_____
BENNETT B. PATTERSON,
Attorneys for Petitioner

BENNETT B. PATTERSON,
of Counsel.
510 Citizens State Bank Bldg.,
Houston, Texas

Dated: Houston, Texas,
July 1, 1954.

I, Bennett B. Patterson, one of the attorneys for the Petitioner in the above-styled and numbered cause, do certify that on the _____ day of June, 1954, I did deliver to Dwight H. Austin of the firm of Liddell, Austin, Dawson & Huggins, Attorneys for the Appellee, three copies of the foregoing petition for writ of certiorari in compliance with Revised Rule 33 of the Supreme Court of the United States.

This the _____ day of June, 1953.

_____
BENNETT B. PATTERSON

I, Dwight Austin, of the firm of Liddell, Austin, Dawson & Huggins, Attorneys for the Respondent, Houston Chronicle Publishing Company, do acknowledge service of three copies of the foregoing petition of Eveline McCullagh,

Petitioner, for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

This the _____ day of June, 1954.

_____

DWIGHT H. AUSTIN

APPENDIX

Exhibit A

Opinion of the Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14627

EVELINE McCULLAGH, *Appellant*,
VERSUS
HOUSTON CHRONICLE PUBLISHING COMPANY, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

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(March 12, 1954)

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

HOLMES, Circuit Judge: This is a tort action instituted by appellant, a citizen of Great Britain, against the ap-

pellee, a corporate citizen of Houston, Texas, for damages sustained by her as the result of a news story and a caricature in the newspaper of appellee. The court sustained appellee's motion to dismiss on the ground that the petition failed to state a claim upon which relief could be granted. Rule 12(b), Federal Rules of Civil Procedure.

On January 22, 1951, the appellant, a dancing instructor, received a *minor* injury while riding as a passenger in a bus of the Houston Transit Company. Subsequently, she filed suit for personal injuries against said company, and the next day the Houston Chronicle, a daily newspaper with a wide circulation, carried on page one of its Sunday edition a story concerning the suit, along with a cartoon or caricature depicting the plaintiff dancing with an animated bus. The headlines of the column read as follows: "Asks $132,500 for 'Unreasonable Jerk.' Bus Skips, Dancer Flips, Suit Nips." Appellant also complains of the following phraseology in the article: "A Houston Transit Company bus that did the boomps-a-daisy when it should have been doing a smooth waltz caused a 45-year-old English dancing teacher to file a $132,500 damage suit in federal court Saturday. The lady claimed she did a very ungraceful adagio flip half way up the aisle of a jerky bus. * * * " The appellant seeks recovery based on a theory of *libel* and on a second theory that the article invaded her *right of privacy*.

Libel in Texas has an exclusive statutory definition. The statute, in substance, provides that libel is a defamation expressed in writing or drawing, tending to injure the reputation of one who is alive, thereby exposing him to public hatred, contempt, ridicule, or financial injury, or tending to impeach the honesty, integrity, or reputation of anyone. Article 5430 of Vernon's Texas Civil Statutes. The

courts of Texas have construed said statute to mean that (there can be no libel unless the publication claimed to be libelous be a defamation tending to injure or impeach the reputation of the person claimed to have been libeled. *Snider v. Leatherwood*, 49 S.W. (2) 1107. The appellant does not allege that the article impeached or injured her reputation, and there is no allegation that it impeached her honesty, integrity, or virtue. *(She alleges only that such caricature and article were defamatory of her*, held her up to ridicule, and were libelous because of such fact.)

A careful examination of the publication complained of convinces us that it fails to contain anything that is defamatory or has a tendency to injure the appellant's reputation. (It may be that she has been made the subject of some ridicule but, according to Texas law, this does not give rise to a cause of action for libel.) *Sweeny v. Caller-Times Pub. Co.*, 41 Fed. Supp. 163.

The law of Texas does not recognize a cause of action for a breach of a right of privacy. Some of the earlier Texas cases had inferred that such a cause of action might lie, but the Texas court in *Milner v. Red River Valley Publishing Co.*, 249 S. W. (2) 227, categorically denied the existence of a cause of action on this theory, and held that any right of this nature must arise under the libel statutes. The decisions of Texas courts have foreclosed any cause of action based on the invasion of privacy, and we are constrained to concur in the judgment of the court below. *Guisti v. Galveston Tribune*, 150 S. W. 874; *Renfro Drug Co. v. Lawson*, 160 S.W. (2) 246; *Harned v. E-Z Finance Co.*, 254 S. W. (2) 81. Cf. *O'Brien v. Pabst Sales Co.*, 124 F. (2) 167.

The judgment appealed from is affirmed.

AFFIRMED.

A True Copy:
Teste:

.....
Clerk of the United States Court
of Appeals for the Fifth Circuit.

Exhibit B

Memorandum Opinion of Court

(Dated, April 22, 1953)

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 6969

EVELINE MCCULLAGH, *Plaintiff*,

VERSUS

HOUSTON CHRONICLE PUBLISHING COMPANY, *Defendant*

Cole, Patterson, Cole & McDaniel (B.B. Patterson) of Houston, Texas; for Plaintiff. Liddell, Austin, Dawson & Huggins (D. W. Austin) of Houston, Texas, for Defendant.

Memorandum:-

On January 22, 1951, the plaintiff, who alleges that she is a citizen of Great Britain and by profession a dancing instructor of national and international fame, was involved in a minor accident while riding as a passenger upon a bus of the public transportation system of this City. Several months thereafter, she filed suit for personal injuries against the transit company, alleging that through negligence of the driver of the vehicle in making a sudden stop, she was violently precipitated from a standing position onto the

floor, as result of which she received personal injuries. That action heretofore has been disposed of.

The day following the institution of such personal injury suit, the Houston Chronicle, a daily newspaper of this City with wide circulation, carried on page one of its Sunday edition a story concerning the incident. This article, and the cartoon accompanying it, form the basis of this present action. The cartoon or caricature, in the familiar comic strip style, depicts the plaintiff dancing with an animated bus. The headline reads: "Asks $132,500 For 'Unreasonable Jerk'—Bus Skips, Dancer Flips, Suit Nips". The news article, consisting of about half of one column, appears to be a substantially accurate account of the institution of the suit and of the allegations in the plaintiff's complaint. There is nothing there of which the plaintiff may make complaint, unless it be the following phraseology:

"A Houston Transit Company bus that did the boomps-a-daisy when it should have been doing a smooth waltz caused a 45-year-old English dancing teacher to file a $132,500 damage suit in federal Court Saturday.

"The lady claimed she did a very ungraceful adagio flip half way up the aisle of a jerky bus.....".

By reason thereof, the plaintiff seeks to recover on a theory of libel and on a second theory to the effect that the article invaded her right of privacy. The defendant has filed a motion to dismiss, contending that the petition fails to allege a claim upon which relief may be granted (Rule 12 (b), F.R.C.P.).

Whether or not the law recognizes a cause of action for breach of a right of privacy has been the source of much comment in recent years by the writers of texts and commentaries, as well as by the Courts. The theory that

such a cause of action exists apparently had its origin with an article appearing in 1890 (4 Harvard Law Review 193). By now, some sixty-three years and innumerable law review articles later, it appears that the action has been recognized in some states, denied in others, while in a number of states there is no clear-cut decision on the issue.[1]

Both parties have filed able briefs collecting the Texas cases which mention or discuss the point. None of them permit recovery for the invasion of a right of privacy. Meadows v. First Nat'l. Bk. (TCA, 149 SW(2d) 591 and Lovejoy v. Mutual Broadcasting System (TCA, 220 SW(2d) 308) infer that such cause of action may lie. United States Life Ins. Co. v. Hamilton (TCA, 238 SW(2d) 289) states that, while no Texas Court has passed upon the question clearly, "we are inclined to the view that the Courts of this State should and would, under appropriate circumstances, recognize damages as a proper remedy for the wrongful invasion of such right. However, we do not think it is necessary for us to decide that precise question in this case, because....."

In a case originating in this State, the Court of Appeals for the Fifth Circuit has recognized the uncertainty of the Texas law upon the point, stating:

"Assuming then, what is by no means clear, that an action for right of privacy would lie in Texas at the suit of a private person, we think it clear that the action fails; because plaintiff is not such a person and the publicity he got was only that which he had been constantly seeking and receiving; .....".

---

[1] For the most recent collection of authorities, which has come to my attention, see 30 Texas Law Review 640.

To the contrary, defendant cites the most recent authority from this State (Milner v. Red River Valley Pub. Co., TCA, 249 SW (2d) 227). This was an action by the wife and children of a person whose death occurred as result of an automobile accident. In reporting the accident and listing the dead and injured, a local newspaper commented on the fact that the deceased had recently been indicted for theft. Contending that this reference to the prior difficulty in which their husband and father had found himself violated their personal privacy, plaintiffs sued for an alleged wrongful invasion of that right. Commenting that the question was then an open one in Texas, the Court categorically denied the existence of a cause of action on this theory of recovery, and held that any right of action of this nature must arise under the libel statutes.

Finding no authority directly in support of plaintiff's theory, and finding the last expression by the appellate Courts of this State to be directly to the contrary, it is my opinion that in so far as the plaintiff's complaint undertakes to allege a cause of action for breach of right of privacy, it fails to state a claim upon which relief may be granted, and to that extent it should be dismissed. It would, in my opinion, be improper for a federal Court to permit recovery on common law principles under a theory which has no stronger support in the Texas authorities than is present here.

Libel is defined by statute in this State (Article 5430), and such definition is exclusive (Times Pub. Co. v. Ray, 1 SW(2d) 471, Aff. 12 SW(2d) 165; Deen v. Snyder, TCA, 57 SW(2d) 338; Sweeney v. Caller Times Pub. Co., 41 Fed. Supp. 163). The gist of the offense is a defamation, expressed in writing or pictures, which tends to injure the reputation of the plaintiff. Judge Funderburk, speaking for

the Eastland Court of Civil Appeals of this State, in Snider v. Leatherwood (49 SW(2d) 1107) has abbreviated the statutory definition and interpreted it as follows:

"Omitting the elements of the statutory definition which can have no application to the state of facts presented, and including all elements which may have such application, the definition is: "A libel is a *defamation* expression . . writing . . tending to *injure the reputation* of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or (tending) to impeach the honesty, integrity . . . . . or reputation of any one." (Emphasis that of the Court);

and further

"Under this definition there can be no libel unless the publication claimed to be libelous be (1) a *defamation* (2) tending to injure or impeach the *reputation* of the person claimed to have been libeled."

A careful examination of the article complained of by the plaintiff in the instant action fails to indicate that there is anything therein contained which an ordinary reader could in anywise interpret as defaming her or as tending to injure her reputation. There is no imputation of dishonor or disgrace; there is no inference of any fraud or impropriety in connection with her personal injury action. There is nothing to indicate that she is wanting in professional skill or attainment. There is no reflection upon her honor, her integrity, or her virtue.

Putting the case most strongly for the plaintiff, I think it may be said that she may have been the subject of some ridicule, in that her unfortunate accident was made a source of amusement to others; and perhaps her feelings and sensi-

bilities thereby suffered. But this does not give rise to a cause of action for libel (Sweeney v. Caller Times Pub. Co., supra, and cases there cited). It well may be that the article is in poor taste and constitutes a rather cheap type of journalism; undoubtedly it is a weak attempt at humor; but, in my opinion, it is not libel. The motion of the defendant to dismiss the action in its entirety for failure to state a claim upon which relief can be granted is well taken and will be granted. It is not necessary to pass upon the defensive issues advanced (conditional privilege, and truth).

Clerk will notify counsel, who will present order within ten (10) days.

Done at Houston, Texas, this 22 day of April, 1953.

BEN C. CONNALLY,
Judge.